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Wills and Decedents' Estates

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WILLS AND DECEDENTS' ESTATES

WILL CONTEST

The case of *State ex rel. Cleveland Trust Company v. Probate Court*[1] constitutes the second act of a drama which commenced with the filing of a will contest action in Cuyahoga County Common Pleas Court.[2] After the will contest action was filed, and all papers, documents and transcripts of testimony were transmitted to the Cuyahoga County Common Pleas Court by the Cuyahoga County Probate Court, the contestant filed an application in probate court to vacate the probate of the will she was then contesting in common pleas court, on the ground that the probated instrument was invalid. Such application was made more than six months after the will was admitted to probate. The executor filed a motion to dismiss the application to vacate probate of the said will on the ground that the probate court, after certifying the will and related papers to common pleas court, pursuant to Ohio Revised Code section 2107.24, was without jurisdiction to entertain an application to vacate the order of probate of the now contested will. The probate court overruled the motion and set the application for trial. The executor thereafter filed an action for a writ of prohibition to prohibit the judges of the probate court from hearing and deciding the application to vacate probate. The judges of the probate court demurred to the petition.

The tone of the court's decision is succinctly capsuled in the statement, found early in its opinion, that ". . . the applicant has elected her remedy in the court of common pleas to which the will and all papers have been certified."[3] In allowing the writ of prohibition, the court held that the provisions of sections 2741.01 to 2741.09 of the Ohio Revised Code providing for will contest actions to be filed in common pleas court, ". . . afford the exclusive remedy for challenging the validity of a will that has been admitted to probate and that a fortiori probate court is without jurisdiction now to entertain the application . . . to vacate the probate of the will which challenges the validity of the will."[4] The court also placed heavy emphasis on the fact that the contestant-applicant consented to the probate of the will in writing, although it does not seem that the absence of such fact would affect the decision of the court. The court indicates that its decision is grounded on practical, as well as jurisdictional grounds, since allowing the probate court to hear the application to vacate probate would result in ". . . a precedent . . . which would re-

1. 165 N.E.2d 668 (Ohio Ct. App. 1960), *aff'd*, 172 Ohio St. 1, 173 N.E.2d 100 (1961).
2. Hecht v. Cleveland Trust Co., Civil No. 718, 402, C.P. Cuyahoga County, Ohio.
3. 165 N.E.2d 668, 672 (Ohio Ct. App. 1960).
4. *Id.* at 674.

sult in chaos to the orderly procedure of the probate of wills and the administration of estates by probate court. . . ."[5] Counsel amicus curiae (who in reality were counsel for the contestant-applicant and who received permission to argue on behalf of her position), asserted that the probate court has power to determine its own jurisdiction. This argument, said the court, ". . . is untenable when the court has patently and obviously lost jurisdiction of the person and subject matter of the action."[6]

A demurrer was filed to the will contest action filed in the case of *Hauer v. Provident Savings Bank and Trust Company.*[7] The demurrer was predicated upon an alleged defect of parties defendant. The lower court apparently took cognizance of the provisions of the contested will and concluded that, under the terms of such will, necessary parties had not been joined as parties defendant within the required period of six months and, therefore, sustained the demurrer. The reviewing court reversed, on the grounds that a demurrer may be sustained only where the alleged defect is apparent on the face of the pleading; and, accordingly, ". . . the court would have no right to go to the will . . . for information. . . ."[8]

The heirs, devisees, and legatees of a testator entered into an agreement that, if an action which had been instituted contesting the validity of testator's will was successful, the estate of the testator would be divided in a specified manner, different from that provided in the will. The executor, who had no beneficial interest in the estate other than in his official position as representative of the estate, was not a party to the aforesaid agreement. The executor, according to the opinion of the court in *Skelly v. Graybill,*[9] was ". . . deliberately not notified . . ."[10] of the time of the trial of the will contest action. The trial resulted in a directed verdict for the contestants, the contestees offering no evidence in rebuttal to the evidence produced by the contestants. The executor filed a motion for a new trial and to set aside the judgment, which motion was granted. The order of the court granting the motion was reversed on the grounds that a contract such as that entered into by the heirs, devisees and legatees of the testator is valid in Ohio and not contrary to public policy. Furthermore, said the court, the executor, having only a representative status, was not a necessary party to such agreement, nor an

5. *Id.* at 675.

6. *Id.* at 676. The decision of the court of appeals was affirmed by the Ohio Supreme Court, which confirmed the holding of the appellate court that the probate court lost its jurisdiction upon certifying the will and related papers to the common pleas court. State *ex rel.* Cleveland Trust Co. v. Probate Court, 172 Ohio St. 1, 173 N.E.2d 100 (1961).

7. 111 Ohio App. 214, 165 N.E.2d 471 (1959).

8. *Id.* at 218, 165 N.E.2d at 473.

9. 109 Ohio App. 277, 165 N.E.2d 218 (1959).

10. *Id.* at 278, 165 N.E.2d at 219.

"adverse party" entitled to notice of the time of the trial of the will contest action. The validity of such a compromise agreement is predicated upon the court's view that such a settlement ". . . reduces litigation. . . ."[11] Indeed, the encyclopedic reference relied on by the court as supporting its view of the validity of such agreement, specifically refers to agreements which are ". . . for the purpose of avoiding litigation. . . ."[12] It is difficult, at least for this writer, to see how litigation has been avoided by an agreement which provides for a distribution of an estate in a manner different from that set forth in the testator's will, *if* a pending will contest action is successful.

RIGHTS OF SURVIVING SPOUSE

The case of *Smyth v. Cleveland Trust Company*[13] serves as a reminder of the validity, in Ohio, of the doctrine associated with the decision of the Ohio Supreme Court in the case of *Bolles v. Toledo Trust Company.*[14] In accordance with this doctrine, a widow, who elected to take under the statutes of descent and distribution, was held, in the *Smyth* case, to be entitled to her distributive share of the property held in a trust which had been created by her husband during his lifetime. The husband reserved to himself the income of the trust during his life and retained the right to amend or revoke such trust. Accordingly, the court, in obedience to the dictates of the *Bolles* case, held that, *as to the widow,* the husband failed ". . . to part with dominion and control over the trust property and this failure to part with dominion and control permits the wife to assert her right under the statutes of descent and distribution to a distributive share of the trust res."[15]

ADMINISTRATION

Section 2109.03 of the Ohio Revised Code provides, in substance, that a fiduciary shall file in the probate court, at the time of his fiduciary appointment, the name of the attorney, if any, who will represent him in matters relating to his fiduciary position. This statutory provision also provides that, if the fiduciary is absent from the state, such attorney shall be the agent for the fiduciary, upon whom summons, citations, and notices may be served, by delivering to such attorney duplicate copies thereof. The court, in the case of *Meisner v. Flemion,*[16] held that the

11. *Id.* at 283, 165 N.E.2d at 222.
12. *Id.* at 280, 165 N.E.2d at 221.
13. 163 N.E.2d 702 (Ohio C.P. 1959).
14. 144 Ohio St. 195, 58 N.E.2d 381 (1944).
15. 163 N.E.2d 702, 707 (Ohio C.P. 1959).
16. 109 Ohio App. 117, 164 N.E.2d 183 (1958). See also discussion in *Civil Procedure* section, p. 464 *supra.*

provisions of section 2109.03 of the Ohio Revised Code authorized service of a summons on a non-resident executor of a local estate, by serving the attorney designated by the executor in the probate court, although the action involved was commenced in common pleas court and not probate court. The court emphasized that the provisions of section 2109.03 authorize service, in the manner therein described, of "*Any* summons, citation, or notice. . . ." (Emphasis added.) "Any summons," concluded the court, includes a summons issued by a common pleas court.

The Court of Appeals of Vinton County, in *In re Estate of Vickers*,[17] considered the question of the discretionary authority of a probate court in appointing an administrator of an intestate estate. The provisions of Ohio Revised Code section 2113.06 direct that administration of the estate of an intestate ". . . shall be granted to persons mentioned in this section, in the following order. . . ." In this case, the probate court appointed, as administrator of the estate, a stranger, not within the classes mentioned in the aforesaid statutory enactment, over the objections of a nephew of the decedent who, as a next-of-kin, would be within a class mentioned in said section 2113.06. The reviewing court reversed the decision of the probate court, ordered the letters of appointment originally granted to be revoked and remanded the cause with instructions to determine the competency and suitability of the nephew and to appoint him as administrator if found qualified. Citing several Ohio Supreme Court decisions[18] to support its decision, the court concluded that, by virtue of the aforesaid section of the Ohio Revised Code, the probate court ". . . has no discretionary powers in this matter, but must appoint an administrator . . . from the class described [in the statute] if there is a competent person in such preferred class."[19]

The case of *Christman v. Christman*[20] was discussed by the author last year. In that case, an administrator's brother and sister filed an action to set aside the administrator's sale of an estate asset to his wife. Such sale had taken place seventeen years prior to the filing of the action, and the court thus held the asserted defense of laches to bar the relief sought. In reaching this decision, the appellate court distinguished an earlier decision of the Ohio Supreme Court[21] on the ground that, under similar facts, the defense of laches had apparently not been asserted. During the period covered by this survey, the *Christman* case reached the Ohio Su-

17. 110 Ohio App. 499, 170 N.E.2d 85 (1959).

18. *In re* Estate of Golembiewski, 146 Ohio St. 551, 67 N.E.2d 328 (1946); Todhunter v. Stewart, 39 Ohio St. 181 (1883).

19. *In re* Estate of Vickers, 110 Ohio App. 499, 501, 170 N.E.2d 85, 87 (1959).

20. 160 N.E.2d 419 (Ohio Ct. App. 1959). See Aronoff, *Wills and Decedents' Estates, Survey of Ohio Law — 1959*, 11 WEST. RES. L. REV. 444, 448 (1960).

21. Magee v. Troutwine, 166 Ohio St. 466, 143 N.E.2d 581 (1957).

preme Court.[22] The supreme court, in affirming the decision of the appellate court, accepted and approved the analysis by the appellate court of the prior decision of the Ohio Supreme Court and, indeed, held such analysis to be ". . . apt and conclusive."[23] This decision establishes, quite clearly, that a sale by an administrator to his wife, though *voidable* is not *void;* and, if parties presumptively injured thereby wish to nullify such a transaction, they must act with reasonable alacrity.

What portions of an estate should bear the brunt of paying debts of the decedent? In the case of *In re Estate of Boughton,*[24] the executors proposed to pay estate debts by selling specifically bequeathed personal property, rather than real estate passing under a residuary clause in the will. Traditionally, personal property was viewed as the initial fund for payment of estate debts.[25] This preferential treatment of realty is an anachronistic throw-back to the early feudal concepts of the importance of landownership. The modern view proclaims that the order of abatement of estate assets to pay debts should conform, as nearly as possible, to the "intention" of the testator.[26] Since it is rare that a testator will provide, in his will, a specific indication of his desires as to abatement, the determination of his intention becomes, more often than not, the chore of the court. In this case, the court concluded that the specifically bequeathed personal property should be preserved at the expense of the realty passing under the residuary clause, at least until such other assets have been exhausted. The concern of the court with the testator's intent is evident in its statement that:

> It is quite apparent from the four corners of the will and codicil that the testatrix was *primarily concerned* with the disposal of her personal effects. (Emphasis added.)[27]

Ohio Revised Code Sections 2109.50 Et Seq.

A considerable amount of judicial controversy and analysis during the period covered by this survey flowed from the provisions of Ohio Revised Code sections 2109.50 et seq. These sections provide, in substance, for the filing of a complaint against a person who is suspected of being or having been in possession of property belonging to an estate. In such event, the court is required to cite the person so charged to appear and be examined regarding the matter of the complaint. The proceedings prescribed by section 2109.50 and the following two sections

22. 171 Ohio St. 152, 168 N.E.2d 153 (1960).
23. *Id.* at 154, 168 N.E.2d at 155.
24. 163 N.E.2d 423 (Ohio P. Ct. 1959).
25. 57 AM. JUR. *Wills* §§ 1466, 1467 (1958).
26. 57 AM. JUR. *Wills* §§ 1466, 1467 (1958).
27. 163 N.E.2d 423, 424 (Ohio P. Ct. 1959).

(2109.51 and 2109.52) are of a summary and inquisitorial character and are quasi-criminal in nature. The statute calls for a finding of guilty or not guilty and further provides a ten per cent penalty to be assessed on the person adjudged guilty in such proceeding, such penalty to be based on the value of the estate property concealed, embezzled, conveyed away, or held by such person.

The most troublesome question plaguing the courts has been and remains the jurisdictional scope of the statutory proceedings above described. The Ohio Supreme Court in the case of *Goodrich v. Anderson,*[28] delineated the boundaries of these special proceedings by saying that the purpose of the statutes relating to proceedings to discover concealed or embezzled assets of an estate

> . . . is not to furnish a substitute for a civil action to recover judgment for money owing to an administrator or executor, but rather to provide a speedy and effective method for discovering assets belonging to the estate and to secure possession of them for the purpose of administration.[29]

Again, in the case of *In re Estate of Black,*[30] the Supreme Court of Ohio found it necessary to state that these special inquisitorial proceedings could *not* be used as a device ". . . *to collect a debt, obtain an accounting or adjudicate rights under a contract.*"[31] (Emphasis added.)

Two recent decisions, by different Ohio appellate courts, clearly reflect the concern of each court with the judicial limitations which the Ohio Supreme Court had constructed around sections 2109.50 et seq. In the case of *Smith v. Simpson,*[32] the Court of Appeals for Hardin County was confronted with a complaint under sections 2109.50 et seq. concerning possessory rights to certain securities claimed by the administrator of the estate of an intestate. The right of possession was dependent on the validity, enforceability, and construction of several contracts. The court, relying on the decision of the Ohio Supreme Court in the case of *In re Estate of Black,*[33] ruled that the proceedings employed could not be used ". . . to adjudicate rights under a contract."[34] Accordingly, the decision of the probate court which purported to so adjudicate such rights was, said this court, void as being in excess of that court's jurisdiction.

The Franklin County Court of Appeals determined, in the case of *In re Estate of Woods,*[35] that the complaint filed under the provisions of

28. 136 Ohio St. 509, 26 N.E.2d 1016 (1940).
29. *Id.* at 509, 26 N.E.2d at 1016 (syllabus 1).
30. 145 Ohio St. 405, 62 N.E.2d 90 (1945).
31. *Id.* at 405, 62 N.E.2d at 91 (syllabus 5).
32. 111 Ohio App. 36, 170 N.E.2d 433 (1959).
33. 145 Ohio St. 405, 62 N.E.2d 90 (1945).
34. 111 Ohio App. 36, 37, 170 N.E.2d 433, 434 (1959).
35. 110 Ohio App. 277, 167 N.E.2d 122 (1959).

sections 2109.50 et seq. was improper as constituting in reality, a request for an accounting between the estate and a brother of the decedent or an attempt to collect, from such brother, a debt owing to the estate. As in the case of *Smith v. Simpson,*[36] the opinion of the court shows a marked respect for and analysis of the decisions of the Ohio Supreme Court which established the jurisdictional confines of such statutory proceedings.

The controversy culminating in the case of *Fecteau v. Cleveland Trust Company*[37] returned the problem of proceedings under sections 2109.50 et seq. to the Ohio Supreme Court. Although presumably aware of the judicial machinations of the appellate courts in recent cases involving these proceedings, the supreme court (or at least five of the members thereof), chose to virtually disregard the obvious and basic questions concerning the statutory provisions involved in the *Fecteau* case. The complaint stated that certain property belonging to the estate in question was suspected as being in the possession of defendant. The gist of the complaint was that moneys had been deposited in a bank account in the joint names of the decedent and defendant, but were so deposited for convenience only and, in reality, were the sole property of the decedent and hence an asset of his estate. The complaint charged that the defendant withdrew the moneys from the account without authority, at a time when the decedent was seriously ill and unconscious. The supreme court affirmed the court of appeals decision in holding that the complaint came within the scope of the aforesaid statutory sections. In doing so, the court spent little time on the question of whether the complaint came within the jurisdictional scope of sections 2109.50 et seq., as delineated by past decisions of the supreme court. Rather, the majority of the court seemed to center attention on the problems involved in determining whether or not the joint and survivor form of the bank account could be modified by extrinsic evidence. Justice Herbert dissented from the majority opinion of five justices (only six justices apparently participated with regard to this case). He emphasized the prior pronouncements of the supreme court, pointing out that, contrary to the decision of the supreme court in the case of *In re Estate of Black,*[38] ". . . the court in this proceeding has been asked to *adjudicate rights under the contract* between the decedent and the bank. . . ." (Emphasis added.)[39] The dissenting justice also argued that broadening the jurisdictional scope of sections 2109.50 et seq. will result in increased use of this quasi-criminal procedure in matters not suited therefor. The dissenting opinion concludes with an objection to

36. 111 Ohio App. 36, 170 N.E.2d 433 (1959).

37. 171 Ohio St. 121, 167 N.E.2d 890 (1960). See also discussion in *Contracts* section, p. 475 *supra.*

38. 145 Ohio St. 405, 62 N.E.2d 90 (1945).

39. 171 Ohio St. 121, 130, 167 N.E.2d 890, 896 (1960) (dissenting opinion.)

the mandatory penal assessment of ten per cent in a quasi-criminal matter which requires only a preponderance of evidence ". . . as contrasted to that ordinarily required in cases criminal in nature. . . ."[40]

Validity of Prior Gifts

Exceptions to the inventory of assets of the estate were filed in the case of *In re Estate of Roth*,[41] claiming that certain property held by the executrix as gifts from the decedent should be inventoried as part of the estate. Apparently the alleged invalidity of such purported gifts was predicated upon the fact that the decedent was, at the time of making such gifts, in a weakened physical condition. On the hearing of such exceptions, a certain wire recording was, over objections, offered into evidence. It contained a recording of a conversation of the decedent with his attorney and others, disclosing his ". . . clearness of mind in declaring his unequivocal intention to have the gifts stand as such. . . ."[42] The court held that the recording was admissible since a proper foundation had been laid to insure the authenticity and reliability of the recording. The court pointed out that, with proper foundation, a stenographic record would be admissible into evidence and thus, the wire recording should be admitted, since it ". . . might be more reliable than the recollected word or the translation of notes made by human hand."[43] This decision gives substantial weight to the suggestion that a wire recording be made at the time of the execution of a will, where there is reason to believe that the competency of the testator might, after his death, be challenged.

CONSTRUCTION

The testatrix, in the case of *Central National Bank v. Cottier*,[44] left a will which was ". . . unusual in the meticulous detail of its provisions."[45] The will specified that various numbers of shares of stock owned by the testatrix were to go to certain specified persons. Stock dividends had been declared and paid on certain of such bequeathed stocks after the execution of the will and, as a result, the testatrix owned, at the time of her death, additional shares of such stock. The court indicated that:

> . . . stock dividends . . . received after the execution of the will, do not go to the legatee in the absence of an indication in the will itself or other relevant circumstances that it was the intention of the testatrix that such stock dividends follow the bequest.[46]

40. *Id.* at 132, 167 N.E.2d at 897 (dissenting opinion.)
41. 170 N.E.2d 313 (Ohio P. Ct. 1960).
42. *Id.* at 314.
43. *Id.* at 315.
44. 163 N.E.2d 709 (Ohio P. Ct. 1958).
45. *Id.* at 711.
46. *Ibid.*

The additional fact that a stock dividend had been paid prior to the execution of codicils to the will, which codicils did not refer to the bequests in question, was cited by the court in reaching the conclusion that the testatrix did not intend the stock dividends to follow and adhere to the bequests of the stock.

The case of *Fifth Third Union Trust Company v. Athenaeum of Ohio*[47] is an interesting case involving construction of testamentary language unique to the situation and parties therein involved. The facts of the case will not be recited herein, since this writer does not believe any substantial gain would be derived therefrom. One interesting item which might be noted in connection with this case is the fact that the court, in attempting to construe the language of the will in question, sought and received the opinion of two prominent English language scholars from Xavier University and the University of Cincinnati on the grammatical questions involved.

The court, in the case of *Brooks v. Eschwege*,[48] held that, in the absence of evidence disclosing a contrary intention, the term "stocks" as used in a will does not include bonds. The court, in bolstering its opinion, points out that the will was apparently prepared by an attorney and that this constitutes ". . . an additional circumstance indicating the language should be given its legal meaning in determining the testamentary intention."[49]

As contrasted with the attorney-drawn will involved in the *Brooks* case, the will confronting the court in the case of *Park National Bank v. Dillon*[50] was apparently drawn by a layman. In this latter will, the descriptive verbs, give, devise, and bequeath were used in each of nine specific bequests without distinguishing, by choice of such verbs, between gifts of personalty and of realty. A residuary clause ordered the residue of the estate to be converted into cash and divided equally among "all devisees hereinbefore named." The court was thus faced with the question of whether the proceeds of the residuary estate should be divided among the nine beneficiaries named in the will or the three named beneficiaries to whom testator gave, devised, and bequeathed realty. The court conceded that ". . . a 'devisee' is . . . in this strict sense, a recipient of real property."[51] However, said the court, emphasizing that a layman and not an attorney had prepared the will, ". . . it seems unlikely and artificial . . . to impose on the testator's apparent intent a strict construc-

47. 169 N.E.2d 707 (Ohio P. Ct. 1959).
48. 108 Ohio App. 567, 162 N.E.2d 897 (1957).
49. *Id.* at 569, 162 N.E.2d at 899.
50. 165 N.E.2d 829 (Ohio C.P. 1959).
51. *Id.* at 832.

tion of the word 'devisee' "[52] as that term is used in the residuary clause of the will. The proceeds of the residuary estate were ordered distributed equally to the persons named in the nine specific items of the will.

STATUTE OF FRAUDS

Testator's widow objected to the action of the executor of testator's estate in refusing to allow appraisers to set off to her, as widow, property exempt from administration and an allowance for a year's support. At issue, in the case of *In re Estate of Weber*,[53] was an oral antenuptial agreement which, after marriage of the testator and his now surviving spouse, was recited in a writing executed by the testator and his spouse. Under the terms of the agreement, each party released the estate of the other from all claims, including all rights or claims which each might hold as widow or widower, respectively. The agreement stated that it was executed "for the purpose of setting forth in writing the agreement heretofore reached by the parties, verbally . . . ," and stated that such verbal agreement had been made ". . . prior to their . . . marriage. . . ."

The widow argued that the asserted antenuptial agreement was unenforceable under the statute of frauds. Section 1335.05 of the Ohio Revised Code provides, in part, that "No action shall be brought whereby to charge . . . a person upon an agreement made upon consideration of marriage . . . unless the agreement upon which such action is brought, *or some memorandum or note thereof,* is in writing and signed by the party to be charged therewith. . . ." (Emphasis added.) The widow, in urging that the writing executed after marriage could not serve as a "memorandum" of the prior oral agreement, emphasized Ohio Revised Code section 3103.06, prohibiting contracts between husband and wife to alter their legal relationship. The Ohio Supreme Court held that the writing in this case did not constitute a *new* contract, subject to the prohibitions of section 3103.06, but, rather, comprised a "memorandum" of an earlier agreement of the parties, consummated prior to their marital union. The "memorandum" nature of the written agreement was further held by the supreme court to satisfy the requirements of the statute of frauds, and thus it barred the widow from any claim to a year's allowance or to exempt property from the estate of her deceased spouse. The Ohio Supreme Court, by this decision, thus declares that a written memorandum of a verbal antenuptial agreement, executed after marriage, will comprise a sufficient "memorandum or note" of such agreement, as required under the Ohio statute of frauds. A significant drafting point should be

52. *Id.* at 832.

53. 170 Ohio St. 567, 167 N.E.2d 98 (1960). See also discussion in *Domestic Relations* section, p. 512 *supra.*